March 1980

Administrative Law: Procedural Due Process and Other Issues

A. Dan Tarlock
IIT Chicago-Kent College of Law, dtarlock@kentlaw.iit.edu

ADMINISTRATIVE LAW: PROCEDURAL DUE PROCESS AND OTHER ISSUES

A. DAN TARLOCK*

Classic federal administrative law concerns itself with three great questions: the allocation of functions between the three constitutional branches of government and the extra-constitutional administrative agency, the procedures that an agency must follow in adjudication and rulemaking, and the proper role of the courts in reviewing administrative discretion.[1] Thus, the traditional role of the courts has been to delineate agencies' constitutional and statutory mandates, create and enforce procedural rights for private individuals enmeshed in the administrative process, and develop standards and procedures for judicial review of administrative action.[2]

In the past decade, classic administrative law has been supplemented by a "new" administrative law which expands the rights of individuals to obtain judicial review of administrative action on behalf of the public generally and takes a more active role in supervising the manner in which administrative agencies exercise the discretion to regulate and plan in the public interest.[3] The "new" administrative law is basically the province of the United States Court of Appeals for the District of Columbia and the United States Supreme Court since the cases which present courts with an opportunity to "reform" the process are generally litigated first in the District of Columbia.

Classic administrative law issues, however, continue to dominate the work of the ten circuits, as this review of the important Seventh Circuit administrative law cases illustrates. The administrative law work of a circuit court outside the District of Columbia basically consists of the demanding task of interpreting United States Supreme Court decisions imposing new procedural duties on informal adjudication and the less demanding but important task of refining the statutory and constitutional procedural rights of regulated individuals and polic-

* Professor of Law, Indiana University, Bloomington; LL.B, Stanford University; B.A., Stanford University.

1. *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.5 (2d ed. 1978).

2. *See* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975) [hereinafter referred to as Stewart].

3. *See* Stewart, *supra* note 2. *See also* W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 144-45 (6th ed. 1974).

ing the routine exercises of discretion by administrative agencies. During 1978-79, the Seventh Circuit rendered several important procedural due process opinions and decided some equally interesting cases on exhaustion of administrative remedies, the retroactive effect of agency orders, and the availability of mandamus. These and other 1978-79 administrative law cases are discussed in this article.

PROCEDURAL DUE PROCESS

The principle judicial counter to the growing dependence of most citizens on the welfare state has been the recognition of procedural due process rights for public employees and benefits claimants. The United States Supreme Court has created these rights in a series of major precedents[4] but no consistent theory has emerged as the Court has consistently, and correctly, refused to hold that citizens have an absolute entitlement to public employment or benefits[5] and announce uniform due process standards.[6] It falls to the circuits and the state courts to apply the delphic pronouncements of the Court.[7]

The Seventh Circuit in 1978-79 decided five important procedural due process cases involving informal agency adjudication. Three public employment cases were decided:[8] one, a pathbreaking opinion, was written, withdrawn and later reissued[9] and the other two cases split on the question of the fairness of the agency procedure under review. In the two public benefits cases,[10] the court showed more sympathy for welfare claimants than the United States Supreme Court has exhibited recently. The Seventh Circuit, in one case, refused to make a major extension of Supreme Court precedents after a careful analysis of the competing issues[11] and in the second case announced a significant, new right to counsel rule for some welfare benefits claimants.[12]

4. *See generally* Paul v. Davis, 424 U.S. 786 (1976); Perry v. Sinderman, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970).

5. Bishop v. Wood, 426 U.S. 341 (1976).

6. *See id.*; Goldberg v. Kelly, 397 U.S. 254 (1970).

7. The Court's rapid twists and turns on what interests qualify for due process protection are set out in L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-9 (1978) [hereinafter referred to as TRIBE].

8. Larry v. Lawler, 605 F.2d 954 (7th Cir. 1978); Winston v. United States Postal Service, 585 F.2d 198 (7th Cir. 1978); Paige v. Harris, 584 F.2d 178 (7th Cir. 1978).

9. Larry v. Lawler, 605 F.2d 954 (7th Cir. 1978).

10. Smith v. Secretary of HEW, 587 F.2d 857 (7th Cir. 1978); Wright v. Califano, 587 F.2d 345 (7th Cir. 1978).

11. Wright v. Califano, 587 F.2d 345 (7th Cir. 1978).

12. Smith v. Secretary of HEW, 587 F.2d 857 (7th Cir. 1978).

Public Employment Cases

Procedural Due Process Rights Prior to Employment

In *Larry v. Lawler*,[13] the Seventh Circuit wrote a procedural due process opinion which extended the United States Supreme Court's understanding of what interests are entitled to procedural protection. The opinion, however, was withdrawn under the Seventh Circuit's Rule 35[14] which prohibits citation of the case in any written document or oral argument filed or made in the circuit. Then, in a surprising move, the Seventh Circuit reissued and published the opinion. The decision was apparently initially withdrawn after the court had second thoughts about the precedent and the government planned to petition for an *en banc* hearing. Regardless of the reissuance, the initial decision to withdraw the opinion raises interesting questions about the public's right to know of important court decisions as well as questions about the merits of the decision.

Larry v. Lawler[15] was a suit by a rejected applicant for civil service eligibility, alleging that he had been deprived of procedural due process when he was not given a hearing to examine the evidence[16] which formed the basis of the rejection. The district court granted summary judgment in favor of the government defendants.[17] The Seventh Circuit determined that the applicant might well have been deprived of procedural due process.[18] In so doing, the court found due process denied because "[i]n effect, Larry has been stigmatized throughout the entire federal government . . . . [and] deprived of the opportunity to work in any capacity for any branch of the government."[19] *Larry* is the first case to recognize procedural rights prior to employment by the federal government[20] and is a significant extension of a recent United States Supreme Court opinion which gave increasing weight to the government's interest in administrative efficiency in deciding what process,

13. 605 F.2d 954 (7th Cir. 1978).
14. 7TH CIR. R. 35(2)(iv).
15. 605 F.2d 954 (7th Cir. 1978).
16. The evidence which formed the basis of the rejection concerned a history of alcoholism. *Id.* at 959.
17. 413 F. Supp. 185 (N.D. Ill. 1976).
18. 605 F.2d at 962.
19. *Id.* at 958.
20. The two cases decided since Board of Regents v. Roth, 408 U.S. 564 (1972), which have considered the issue, refused to recognize a right to procedural due process when a person is considered for public employment. Counts v. United States Postal Serv., 18 Empl. Prac. Dec. ¶ 8788, 17 Fair Empl. Prac. Cas. 1161, 1164 (N.D. Fla. 1978); Thompson v. Link, 386 F. Supp. 897, 899 (E.D. Mo. 1974). *Cf.* Jackson v. Nassau County Civil Serv. Comm'n, 424 F. Supp. 1162 (E.D. N.Y. 1976) (substantive due process). *See generally* Note, *The Interests in Reputation and Employment—Paul v. Davis and Bishop v. Wood*, 18 B.C. INDUS. & COM. L. REV. 545 (1977).

if any, is due.[21] The narrow holding in *Larry* is not, however, of great significance since the Civil Service Reform Act of 1978[22] provides a right to an oral hearing in cases such as *Larry*. Nevertheless, the opinion is an important Seventh Circuit and national precedent for the expansion of procedural due process at a time when the Supreme Court is limiting the situations in which the Constitution guarantees a right to a hearing with respect to low visibility administrative decisions. Thus, the decision to withdraw and then reissue the opinion is significant.

Larry would seem to be a prime candidate for publication under the Seventh Circuit's Rule 35.[23] Rule 35 provides that only opinions which meet the following criteria should be published:

(i) Establish a new or change in existing rule of law;
(ii) Involve an issue of continuing public interest;
(iii) Criticize or question existing law;
(iv) Constitute a significant and non-duplicative contribution to legal literature . . . ; or
(v) Reverse a judgment or deny enforcement of an order when the lower court or agency has published an opinion supporting the order.[24]

Larry appears to meet the requirements for publication under rule 35. While the court's decision to avoid establishing a precedent when all possible implications have not been considered is commendable, the withdrawal of a precedent-setting opinion after publication as a slip opinion is a danger to the need of the legal profession and the public to know of an important legal development. In the future, the application of rule 35 should be limited to relieving the legal profession and the public of the need to wade through the increasing flow of opinions of limited or no significance.

Procedural Due Process Rights After Employment

Larry is an easy case for the denial of due process, but when an employee is hired by the government, the issues are more complex. One of the most difficult issues in informal adjudication is the problem of what process is due public employees when they are terminated. Federal employees covered by civil service receive considerable protection as a result of the Civil Service Reform Act of 1978,[25] but the coverage of non-civil service employees and non-federal employees remains

21. Paul v. Davis, 424 U.S. 786 (1976).
22. 5 U.S.C. § 2301 (1978 Supp.).
23. 7TH CIR. R. 35.
24. *Id. See generally* Comment, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*, 39 U. PITT. L. REV. 309 (1977).
25. 5 U.S.C. § 1207 (1978 Supp.).

spotty.[26] In theory, the United States Supreme Court has announced a two-part test to decide what process is due. First, the employee must meet a threshold showing that he has a protected liberty or property interest.[27] Second, the court engages in the *Mathews v. Eldridge*[28] balancing test to determine what process is due in the situation before the court. However, the two tests merge into the single question of the fairness of the procedures employed, given the competing interests at stake. The source of constitutionally-protected liberty and property interests has never been clearly articulated by the United States Supreme Court because the Justices seem hopelessly split on the issue.[29] The choice, however, would appear to be between a federal common law of property rights based on the Constitution and a requirement of legislative recognition of property and liberty interests as a necessary condition to affording due process protection.[30]

The latest United States Supreme Court case to consider this issue, *Bishop v. Wood*,[31] seems to hold that legislative recognition is a necessary condition for due process protection.[32] Thus, according to *Bishop*, if the legislature chooses not to recognize a property or liberty interest, no process is due when an employee is terminated other than that provided by statute.[33] *Bishop* has been criticized on the basis that the United States Supreme Court cases in this area, beginning with *Goldberg v. Kelly*,[34] have established the principle that one has a constitutional right to an explanation when one's employment is terminated.[35] *Bishop*, however, remains the law with regard to the source of due process rights.

Two important public employment cases in 1978-79 required the Seventh Circuit to apply the United States Supreme Court cases on termination procedures. *Winston v. United States Postal Service*[36] involved a non-preference eligible employee who was fired for making threats while on duty.[37] Under a collective bargaining agreement, the employee was entitled to an informal hearing. An informal hearing

26. *See* Bishop v. Wood, 426 U.S. 341 (1976).
27. Board of Regents v. Roth, 408 U.S. 564 (1972).
28. 424 U.S. 319 (1976).
29. *Compare* the various opinions in Arnett v. Kennedy, 416 U.S. 134 (1974).
30. *See* TRIBE, *supra* note 7, at § 10-7.
31. 426 U.S. 341 (1976).
32. *Id.* at 344.
33. *Id.* at 345.
34. 397 U.S. 254 (1970).
35. *See generally* Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60 (1976).
36. 585 F.2d 198 (7th Cir. 1978).
37. The employee allegedly made threats to kill his supervisor. *Id.* at 200.

was granted, but no witnesses were called to testify. The employee argued that the National Collective Bargaining Agreement[38] for postal workers and the due process clause[39] required a trial-type hearing.

Preference-eligible employees are entitled to trial-type hearings[40] but no similar remedy was provided for the plaintiff in *Winston*.[41] The Seventh Circuit reviewed the extensive legislative history of the Postal Reorganization Act[42] and found no statutory right to a trial-type hearing.[43] The *Winston* court concluded that Congress clearly intended that grievance procedures by postal employees would be established solely by collective bargaining agreements.[44] Thus, the issue was the employee's constitutional right to due process.

The United States Supreme Court cases define a constitutionally protected property right as an estoppel as against the government.[45] An estoppel arises when the government holds out the expectation of a benefit such as employment and surrounds the benefits with sufficient standards to give rise to a reasonable expectation that they will not be terminated arbitrarily.[46] In *Winston*, the Seventh Circuit determined that the National Collective Bargaining Agreement created an expectation on the part of employees to remain on the job unless just cause for removal is shown.[47] The lack of a trial-type procedure in *Winston* arguably would create a risk of erroneous deprivation of procedural due process. The Seventh Circuit, however, concluded that the *Winston* grievance procedures minimized the risk of error, noting that postal

38. 39 U.S.C. § 1206 (1976).

39. U.S. CONST. amend. V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

40. 5 U.S.C. § 7512 (1976).

41. 585 F.2d at 210.

42. 39 U.S.C. § 101 (1976).

43. 585 F.2d at 202-07.

44. At issue was 39 U.S.C. § 1001(b) (1976) which provides:

> The Postal Service shall establish procedures, in accordance with this title, to assure its officers and employees meaningful opportunities for promotion and career development and to assure its officers and employees full protection of their employment rights by guaranteeing them an opportunity for a fair hearing on adverse actions, with representatives of their own choosing.

45. *See, e.g.*, Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) (public utility customers entitled to due process before service cut off as statute limited utility's right to stop service only where "cause" exists); Morrissey v. Brewer, 408 U.S. 471 (1972) (parolee entitled to due process hearing before parole is revoked).

46. Morrissey v. Brewer, 408 U.S. 471, 479 (1972).

47. 585 F.2d at 208.

workers should be treated the same as private sector employees who are confined to union-negotiated grievance procedures and findings.[48] Thus, the Seventh Circuit affirmed the district court holding that non-preference employees were limited to grievance procedures set out in the collective bargaining agreement because although such employees have a constitutional property interest in continued federal employment, the grievance procedure specified in the bargaining agreement satisfied the requirements of due process.[49]

Another recent Seventh Circuit case which illustrates the sources of a property interest by estoppel is *Paige v. Harris*.[50] In *Paige*, the plaintiff, Paige, was an attorney with the Chicago office of the Department of Housing and Urban Development[51] when he was advised that he had been fired for inadequate performance.[52] Paige immediately brought suit to demand a hearing and the district court denied relief.[53] The Seventh Circuit reversed, holding that the plaintiff was entitled to some kind of hearing since the HUD "handbook"[54] created a reasonable expectation of job tenure.[55]

Of greater interest in *Paige* is the court's response to the argument that a citizen has a due process "interest" in keeping his general reputation free from damage by government action.[56] The United States Supreme Court recently set a high standard to determine when governmental disclosure of adverse information violates one's right to due process in *Paul v. Davis*.[57] The Seventh Circuit in *Paige* found that the

48. The Seventh Circuit stated:

> Appellants were each given a thirty-day notice of discharge (with pay), which included the reason for the discharge. They were given the right to file grievances, and they personally discussed their cases with their immediate supervisors, accompanied by their union representative. They exercised their right, through their exclusive representative, to two additional appeals to successively higher levels of management at which the reasons for denying the grievances were discussed. Their exclusive representative had the legal right to fully investigate the grievances and to obtain from USPS any information or documentation reasonably necessary to process the grievances . . . .
>
> Finally, appellants, through their exclusive representative, had an opportunity to request arbitration of their grievances. Although their representative declined their requests to demand arbitration, appellants could have sued the Union for breach of its duty to fairly represent them if the refusal to demand arbitration was not in good faith.

Id. at 209-10 (citations omitted).

49. *Id.* at 210.

50. 584 F.2d 178 (7th Cir. 1978).

51. Hereinafter referred to as HUD.

52. Paige was given a memorandum advising him that he was fired for inadequate performance in the areas of technical expertise, judgment, and supervisory performance.

53. 446 F. Supp. 40 (S.D. Ind. 1977).

54. 584 F.2d at 179.

55. The Seventh Circuit applied the Board of Regents v. Roth, 408 U.S. 564 (1972), standard. 584 F.2d at 181.

56. *Id.* at 184.

57. 424 U.S. 786 (1976).

charges of inadequate performance on the job "do not rise to the level of 'degrading' and 'unsavory' charges which would 'expose him to public embarrassment and ridicule.' "[58]

Public Benefits Cases

Procedural Due Process and Administrative Efficiency

Welfare benefit programs such as Social Security provide a statutory right to a hearing before a benefit denial is final,[59] but the hearing generally comes after an initial decision denying or terminating benefits.[60] Generally, a claimant seeks a hearing before an initial denial or termination decision is made. The issue in these cases is the timing of the due process procedures rather than the existence of the right to due process. In the 1970 decision of *Goldberg v. Kelly*,[61] the United States Supreme Court held that a welfare applicant had a right to a pre-termination hearing. Six years later, however, in *Mathews v. Eldridge*,[62] the Court drew the rather subtle distinction between a pre-termination hearing for welfare benefits and a pre-termination hearing for disability benefits. In *Mathews*, *Goldberg* was limited to its facts and no right to a pre-termination hearing was recognized for disability benefits.[63] The Court announced a rough utilitarian calculus which attempts to discount the applicant's interest in a hearing by the probability that interest will be adequately protected by the existing process and then subtracts from that the cost of administering an additional layer of hearings.[64] The *Mathews* formula has been criticized as slighting the value of protecting through fair procedures an individual's interests in dignity and equality of treatment,[65] but the opinion clearly signals

58. 584 F.2d at 184, *citing* Wisconsin v. Constantineau, 400 U.S. 433, 436-37 (1971).
59. 42 U.S.C. § 301 (1976).
60. *Id.* § 405(b).
61. 397 U.S. 254 (1970).
62. 424 U.S. 319 (1976).
63. *Id.* at 349.
64. As Justice Powell explained in *Mathews*:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 334-35.

65. *See* Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 47-48 (1976). *See generally* Note, *Specifying the Procedures Required By Due Process: Towards Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975).

lower courts to pay more attention to the costs of administering justice on a massive scale.

Wright v. Califano[66] forced the Seventh Circuit to apply *Mathews* in a case where substantial interests in welfare benefits were nicely balanced by the high costs of protecting the interests. In *Wright*, the issue was whether a district court could order the Social Security Administration[67] to provide hearings within a reasonable time after an old age and survivors benefits claim was filed. The district court ordered the SSA to set a hearing schedule or to make interim payments until a final, unfavorable eligibility determination was made.[68] The district court based its decision on the Social Security Act and the Administrative Procedure Act; the former requires reasonable notice and opportunity for a hearing after an eligibility denial[69] and the latter requires a hearing within a reasonable time "with due regard to convenience."[70]

The Seventh Circuit in *Wright v. Califano*[71] reversed the district court's holding. The Seventh Circuit agreed that the SSA was required to hold hearings within a reasonable time, but found the definition of the term to be within the discretion of the agency.[72] While there is no reason to defer to the discretion of the agency on an issue of procedural fairness which involves an important individual interest, the Seventh Circuit in *Wright* had little choice. The SSA is so hopelessly bogged down in delays as to defy an effective judicial remedy at any reasonable cost. The *Wright* court couched its reasoning in the failure of Congress to remedy the problem and the lack of judicial standards,[73] but the

66. 587 F.2d 345 (7th Cir. 1978).
67. Hereinafter referred to as the SSA.
68. *See* 587 F.2d at 346-47.
69. 42 U.S.C. § 405(b) (1976).
70. 5 U.S.C. § 554(b)(3) (1976) provides, in pertinent part:
In fixing the time and place for hearings, due regard shall be had for the convenience and necessity to the parties or their representatives.
71. 587 F.2d 345 (7th Cir. 1978).
72. *Id.* at 352-53.
73. The Seventh Circuit stated:
Congress has committed the timing of hearings and reviews to the discretion of the SSA. It has continually monitored the appeals delay problem; yet it has failed to prescribe mandatory time limits, interim benefit payments or other funding. Congress is not a party in this case. In these circumstances, we believe the courts should be hesitant to require such measures absent a due process violation or clear violation of congressional intent. In addition, since the delays complained of are system-wide and there are no allegations of bad faith, a dilatory attitude, or a lack of evenhandedness on the part of the agency, the reasonableness of the delays in terms of the legislatively imposed "reasonable dispatch" duty must be judged in the light of the resources that Congress has supplied to the agency for the exercise of its functions, as well as the impact of the delays on the applicants' interests. Since administrative efficiency is not a subject particularly suited to judicial evaluation, the courts should be reluctant to intervene in the administrative adjudication process, absent clear congressional guidelines or a threat to a constitutional interest. Here, given the good faith efforts of the SSA to cope with the delay

Seventh Circuit actually was declining, in a prudent manner, to order a remedy which it could not police and which would be very costly—regardless of the plaintiffs' interest.

The plaintiffs in *Wright* also raised a due process claim. Again, the Seventh Circuit found *Mathews* dispositive. The court determined that it was "not justified in sanctioning the imposition of unrealistic and arbitrary time limitations on an agency which for good faith and unarbitrary reasons has amply demonstrated its inability to comply."[74] Taken literally, the Seventh Circuit's analysis underlines the theoretical foundation of due process which recognizes due process rights as a counter to the risks of administrative efficiency. Thus, high costs or "impossibility" *per se* is not a defense to the imposition of due process requirements. Yet, courts cannot avoid the hard question of deciding which claims rise to the dignity of rights which veto collective judgments about the distribution of the public fisc. It is appropriate, as the court did in *Wright*, to refrain from recognizing a right to the existence of a government benefit program. Due process protection should be reserved for situations where the individual is subject to the risk of individualized loss through the summary administrative process insensitive to his interest or where the legislature has shown some relatively clear intent to single out certain individuals to receive these public benefits. *Wright* falls within neither of these categories and is one of those unfortunate cases where a public welfare program is not working as its framers intended, yet where a judicial remedy would be inappropriate.

It is said that administrative due process is distinguished from judicial due process by the flexibility with which the former is administered. The agency has the initial discretion to balance the claimants need for due process against the agency's need for efficiency. In *Ringquist v. Hampton*,[75] the Seventh Circuit reviewed and sustained the Internal Revenue Service Commission's[76] discretion to build a case against an IRS auditor for making false statements in his audit reports by the use of taxpayer affidavits. The auditor charged that the use of the taxpayer affidavits denied him the right to confront and cross-ex-

> problem under severe resource constraints and the prospect of future progress in the reduction of processing times, we do not believe that the present delays are so unreasonable as to justify, no matter how well-intentioned, the district's resort to its extraordinary equitable powers to impose mandatory time limits and presumptive eligibility.

Id. at 353-54. The court cited Goldman, *Administrative Delay and Judicial Relief*, 66 MICH. L. REV. 1423 (1968).

74. 587 F.2d at 356.

75. 582 F.2d 1138 (7th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979).

76. Hereinafter referred to as IRS.

amine witnesses.[77] To prove such a denial of administrative due process, there must be a showing that the claimant's ability to obtain the truth was seriously prejudiced.[78] The *Ringquist* court found that the auditor was not denied due process because he failed to show that his ability to obtain the truth was so prejudiced.[79] The auditor also alleged that due process was violated when he was not shown certain portions of relevant investigative reports related to the tax returns in question.[80] The Seventh Circuit in *Ringquist* rejected this argument, concluding that "[i]t is not violative of due process to withhold those portions of investigative reports which were not used to support the discharge."[81] *Ringquist* illustrates the court's willingness to grant flexibility to agencies to structure their internal procedures.

Right to Counsel

As a general rule, there is no right to counsel in administrative hearings.[82] Nonetheless, a government hearing where a person who is unable to present his case effectively is deprived of valuable government benefits may be a violation of due process. In such a case, either the agency must appoint counsel or conduct the hearing so that the party is in effect represented by counsel.[83]

Smith v. Secretary of Health, Education & Welfare[84] involved the denial of a sixty-one year old former laundry worker's disability claim. The administrative law judge explained to Smith that she was entitled to counsel but failed to explain how important a lawyer would be in light of the complicated medical evidence involved in the claim. The Seventh Circuit found the hearing to be unfair.[85] In so doing, the court noted that while there is no constitutional right to counsel in such cases, the administrative law judge in *Smith* should have explained the situa-

77. 582 F.2d at 1140.
78. Fuentes v. Shevin, 407 U.S. 67, 97 (1972).
79. The Seventh Circuit stated:
> [A]lthough the reliability of the taxpayer affidavits was questioned by plaintiff, the affidavits do not contradict Ringquist's explanation of the audit discrepancies. Plaintiff's theory of defense is that although the taxpayers did not have the documents to support the deductions which plaintiff found to be technically "verified," he innocently received the necessary verification from the tax preparer. . . . Thus, it was unnecessary for plaintiff, in this case, to test the reliability of the affiants by cross-examination.

582 F.2d at 1141 (citations omitted).
80. *Id.*
81. *Id.*
82. K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 7.00 (1976 ed.).
83. Gold v. HEW, 463 F.2d 38 (2d Cir. 1972).
84. 587 F.2d 857 (7th Cir. 1978).
85. *Id.* at 859.

tion to the plaintiff in greater detail.[86] Thus, the case was remanded because of the administrative law judge's failure to develop a full and fair record which probed the issues of the plaintiff's physical and mental disabilities which an attorney representing the plaintiff would have raised at the hearing.[87]

Smith does not discuss the issue of how an agency may discharge its duty in similar cases. However, it would seem that an agency has three options. First, counsel could be appointed. Second, the agency could provide for a waiver of the opportunity to be represented with a fair warning of the risks of proceeding *pro se* or without a lawyer and hope that a waiver would stand up. Third, the record could show that the administrative law judge in effect acted as her counsel by raising all issues necessary for an effective presentation of plaintiff's case.

GOVERNMENT ACCESS TO INFORMATION

OSHA Inspections

In 1978, the United States Supreme Court in *Marshall v. Barlow's, Inc.*[88] held that the Constitution requires a search warrant for an administrative search to enforce the Occupational Safety and Health Act.[89] *Barlow's* does not require the agency to show "probable cause" as the term is defined in criminal procedure, but administrative probable cause must be shown. According to the United States Supreme Court, administrative probable cause may be based on specific evidence of an existing violation or on a search which is part of a reasonable enforcement program.[90] Thus, a search may be random if there

86. The Seventh Circuit stated:

> We are mindful that there is no constitutional right to counsel and the Secretary has no duty to urge counsel upon a claimant. Where, as here, the record discloses possible mental illness coupled with a misconception as to the role of a lawyer, the ALJ should have, at the very least, explained these interrelated subjects in greater detail and with greater care. This failure provides the backdrop for further deficiencies in the record. The mere failure of a disability claimant to be represented by a lawyer at a hearing is not in itself sufficient to warrant reversal on remand. However, the importance of counsel in administrative procedures has been emphasized. Courts have also reversed and remanded cases involving absence of counsel where other factors were present. The quality of representation may also be the basis for remand. Recent legal literature analyses the various elements of the concern for the unrepresented claimant.

Id. at 860 (citations omitted). The court also relied on Popkin, *The Effect of Representation in Nonadversary Proceedings—A Study of Three Disability Programs*, 62 CORNELL L. REV. 989 (1977).

87. 587 F.2d at 861.

88. 436 U.S. 307 (1978). In a decision rendered immediately after *Barlow's*, the Seventh Circuit held that OSHA is not an invalid delegation of legislative power to the administrative agency. *In re* Establishment Inspection of Blocksom & Co., 582 F.2d 1122 (7th Cir. 1978).

89. Hereinafter referred to as OSHA.

90. In Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), the Court stated:

are reasonable legislative or administrative standards for conducting an inspection.

The Seventh Circuit in 1978-79 refined these standards and answered related questions concerning OSHA enforcement. For example, the court in *In re Establishment Inspection of Gilbert & Bennett Manufacturing Co.*[91] held that federal district courts have subject matter jurisdiction to compel obedience to OSHA inspection warrants.[92] The court in *Gilbert* refused to follow a Fifth Circuit decision[93] which held that OSHA does not authorize injunctive relief to compel obedience. In *Marshall v. Shellcast Corp.*,[94] the Fifth Circuit reasoned that since the OSHA statute does not expressly confer jurisdiction to compel obedience to the OSHA warrants, none should be implied because Congress considered surprise an essential element of OSHA searches.[95]

Administrative probable cause was the issue in *In re Establishment Inspection of Northwest Airlines, Inc.*[96] and *Weyerhaeuser Co. v. Marshall*.[97] In *Northwest Airlines*, OSHA submitted a highly conclusionary affidavit in an attempt to establish probable cause for an OSHA inspection.[98] OSHA conceded that the affidavit did not establish specific evidence of a violation. The Seventh Circuit in *Northwest Airlines* held that the affidavit did not establish administrative probable cause as required by *Marshall v. Barlow's, Inc.* since the affidavit did not constitute an "administrative plan derived from neutral sources."[99] In

> For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]."

Id. at 320 (footnote omitted).

91. 589 F.2d 1335 (7th Cir. 1979).

92. *Id.* at 1344.

93. Marshall v. Gibson's Products, Inc., 584 F.2d 668 (5th Cir. 1978).

94. 592 F.2d 1369 (5th Cir. 1979).

95. *Id.* at 1371. *Shellcast* followed a previous district court opinion in Brennan v. Gibson's Products, Inc., 407 F. Supp. 154 (E.D. Tex. 1976).

96. 587 F.2d 12 (7th Cir. 1978).

97. 592 F.2d 373 (7th Cir. 1979).

98. The Seventh Circuit in *Northwest Airlines* stated:

> On February 15, 1977, the Occupational Safety and Health Administration ("OSHA") received a written complaint from an employee of Northwest Airlines, Inc. This complaint alleged in pertinent part, that violations of the Act exist which threaten physical harm to the employees, and an inspection by OSHA was requested. Based on the information in the complaint, OSHA had determined that there are reasonable grounds to believe that such violations exist, and desires to make the inspection required by section 8(f)(1) of the Act.
>
> The desired inspection is also part of an inspection and investigation program designed to assure compliance with the Act and is authorized by section 8(a) of the Act.

587 F.2d at 13-14.

99. *Id.* at 15.

Weyerhaeuser Co. v. Marshall,[100] a highly conclusionary affidavit similar to the one in *Northwest Airlines* was found not to establish administrative probable cause.[101]

Enforcement of Administrative Subpoenas

United States v. Lenon[102] involved the question of the IRS's power to enforce a subpoena after some information had been obtained voluntarily from the taxpayer. In *Lenon*, the taxpayer was subjected to a routine quality audit which turned up possible evidence of fraud. The quality audit had been performed on the company's premises and the IRS issued a subpoena to obtain the books and records of the corporation. The United States Supreme Court requires three elements to enforce an IRS subpoena.[103] The IRS must show that the investigation will be conducted pursuant to a legitimate purpose, the IRS Commissioner does not already possess the information, and the administrative steps required by the IRS Code have been followed.[104] The taxpayer in *Lenon* convinced the district court that the third element had not been met because as a result of the routine audit the government had seen the records and was therefore in possession of them.[105] The Seventh Circuit reversed, following an almost uniform federal rule[106] which distinguishes between a routine quality audit and a tax fraud investigation audit.[107]

The Freedom of Information Act

The Freedom of Information Act[108] gives any citizen the absolute right to the disclosure of publicly held information unless the information falls within one of the specific exemptions to the statute.[109] The most difficult exemption to enforce is the national security exemption since the statute combines the recognition of the ill-defined executive privilege with a congressional policy of national security protection.

100. 592 F.2d 373 (7th Cir. 1979).
101. The Seventh Circuit concluded that the affidavit stripped the magistrate of his probable cause factors "as the very purpose of a warrant is to have the probable cause determination made by a detached judicial officer rather than by a perhaps overzealous law enforcement agency." *Id.* at 378.
102. 579 F.2d 420 (7th Cir. 1978).
103. United States v. Powell, 379 U.S. 48 (1964).
104. *Id.* at 57-58.
105. 78-1 U.S.T.C. ¶ 9159, 42 A.F.T.R.2d 78-5810 (1977).
106. *See, e.g.*, Donaldson v. United States, 400 U.S. 517 (1971).
107. *Id.* at 534-35.
108. 5 U.S.C. § 552 (1976).
109. *Id.*

With all documents, the balance between security and disclosure is struck on a paragraph-by-paragraph basis through *in camera* inspections by the district courts as mandated by the 1974 amendments to the Freedom of Information Act.[110]

Terkel v. Kelly[111] arose out of an attempt by author Studs Terkel to obtain all FBI files referring to him. A Freedom of Information Act request produced one hundred and forty-six pages of documents, but several were withheld under the national security[112] and investigatory records[113] exemptions to the act. The district court refused to make an *in camera* inspection of the withheld documents to determine if the criteria for the exemptions had been met.[114] Rather, the district court found that the FBI had released a sufficiently detailed description of the withheld documents to allow a judge to determine if the exemptions applied. Terkel appealed on the ground that failure to inspect constituted an abuse of discretion by the district court. The Seventh Circuit agreed with the district court, except regarding three pages of investigative reports.[115] As to these, the Seventh Circuit ordered an *in camera* inspection because it was not apparent from the face of the documents why they should not be released.[116]

Prevention of Government Disclosure of Information

The reverse side of the problem of when the government can acquire information is when a party can sue to prevent the government from disclosing information that it already has. *Burlington Northern, Inc. v. Equal Opportunity Employment Commission*[117] raised this issue.

110. The 1974 Amendments to the Freedom of Information Act provide, in pertinent part:
> This section does not apply to matters that are . . . investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

Id. § 552(b)(7).

111. 599 F.2d 214 (7th Cir. 1979), *cert. denied sub nom.*, Terkel v. Webster, 48 U.S.L.W. 3430 (U.S. Jan. 7, 1980) (No. 79-518).

112. 5 U.S.C. § 552(a)(4)(B) (1976).

113. *Id.* § 552(b)(1).

114. *See* 599 F.2d at 217.

115. *Id.* at 217-18.

116. *Id.* at 218.

117. 582 F.2d 1097 (7th Cir. 1979). The Equal Opportunity Employment Commission is hereinafter referred to as the EEOC.

Title VII of the Civil Rights Act of 1964[118] creates two parallel methods of enforcing violations of an employer's duty of non-discrimination. An aggrieved employee may bring suit directly against the employer and the commission may also bring suit against the employer on behalf of named victims of discrimination, charging parties, or a broad class of past victims. Coordination between the two remedies is provided by giving the EEOC the right to bar private suits until a right to sue letter has been issued. *Burlington Northern* involved the right of the EEOC to disclose to a private plaintiff in a class action investigation files obtained as a result of a national investigation of systematic discrimination by the railroad. Title VII prohibits the EEOC from making "public" any information obtained in an investigation prior to the institution of suit by the EEOC.[119] The EEOC, however, wished to disclose its investigation files to plaintiffs over Burlington's objection on the ground that individual charging parties were not members of the public within the meaning of the statute.

The court in *Burlington Northern* framed the issue as whether private actions were the norm or the exception to EEOC enforcement of title VII. Despite the well-publicized backlog of EEOC complaints, the subject of a recent agency reorganization, the court followed the District of Columbia Circuit[120] rather than the Fifth Circuit[121] and characterized the private action as the exception to EEOC enforcement. Once this characterization was made, it followed that allowing disclosure would undercut the congressional policy of EEOC enforcement since private law suits would be encouraged.[122] Thus, the Seventh Circuit in *Burlington Northern* held that prior to the certification of the class, the EEOC could only disclose information relevant to the claims of the named plaintiffs.[123]

Barriers to Judicial Review

A party seeking judicial review must surmount the barriers of standing, ripeness, exhaustion, and non-preclusion of review. The Seventh Circuit decided important exhaustion, preclusion, and standing cases during 1978-79.

118. 42 U.S.C. § 2000(e) (1976).
119. *Id.* § 2000(e)8.
120. Sears Roebuck & Co. v. EEOC, 581 F.2d 941 (D.C. Cir. 1978).
121. H. Kessler & Co. v. EEOC, 472 F.2d 1147 (5th Cir. 1973) (en banc), *cert. denied*, 412 U.S. 939 (1974).
122. 5 U.S.C. § 552(b)(7) (1976). For the text of section 552(b)(7), *see* note 110 *supra*.
123. 582 F.2d at 1101.

Standing

No question of administrative law is more confusing than the standard used to determine who has standing to challenge administrative action. Originally, one had standing if one had a claim on the merits.[124] The United States Supreme Court no longer formally adheres to this position, but it has not articulated a rationale to justify allowing access to the courts by those who have no claim on the merits.[125] The Court has, however, rejected the argument that any individual who is willing to pay the cost of suit has standing. In *Sierra Club v. Morton*,[126] the United States Supreme Court rejected this "private attorney general" theory, holding that article III of the Constitution requires that a person be injured in fact by the action.[127] Encouraged by a subsequent United States Supreme Court decision,[128] lower federal courts reduced injury in fact to a pleading fiction and greatly expanded standing to competitors and public interest plaintiffs.[129] In recent years, the Court has been unhappy with this expanded law of standing and has added a second, non-constitutional requirement in the interest of conservation of scarce judicial resources. A plaintiff must now show a nexus between benefit to him and the relief that the court might grant.[130] Thus, standing now has constitutional and non-constitutional dimensions: article III requires that the plaintiff be injured in fact and the United States Supreme Court requires a nexus between the benefit to the plaintiff and the proposed relief.[131]

Two important standing cases were decided by the Seventh Circuit during 1978-79. In both cases, the court acted to broaden access to the courts by refusing to follow recent United States Supreme Court opinions which limited such access. *Bread Political Action Committee v. Federal Election Commission*[132] was a challenge to the constitutionality

124. *See, e.g.*, Perkins v. Lukens Steel Co., 310 U.S. 113 (1940); Tennessee Power Co. v. TVA, 306 U.S. 118 (1939).

125. *See* Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970). *Compare* Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976) *with* Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

126. 405 U.S. 727 (1972).

127. *Id.* at 737-41.

128. United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973).

129. *See* Local 194, Retail, Wholesale & Dep't Store Union v. Standard Brands, Inc., 540 F.2d 864 (7th Cir. 1976).

130. Warth v. Seldin, 422 U.S. 490 (1975).

131. *See* TRIBE, *supra* note 37, at § 3-22; Comment, *Associational Third Party Standing & Federal Jurisdiction Under Hunt*, 64 IOWA L. REV. 121 (1978) [hereinafter referred to as *Standing Under Hunt*].

132. 591 F.2d 29 (7th Cir. 1979).

of parts of the Federal Election Campaign Act brought by the political action committees of various trade associations. The plaintiffs sought expedited judicial review under section 437h of the Federal Election Campaign Act[133] which grants standing to bring suit to the Federal Election Commission, the national committee of any political party or any eligible voter. The district court held that the plaintiffs were not one of the three classes named in section 437h and denied the expedited judicial review.

The Seventh Circuit reversed and held that the trade and political associations comprising the Bread Political Action Committee had the necessary "personal stake" in the suit to grant them standing.[134] In so holding, the court reasoned that the right to petition the government is so central to our political system that section 437h was intended to extend standing to the maximum extent permissible under article III.[135] Relying on the United States Supreme Court's decision in *Buckley v. Valeo*,[136] which dealt with similar standing issues, the court concluded that there was no indication in the language of the statute to exclude any plaintiffs who have standing under traditional rules.[137] The Sev-

133. Section 437h of the Federal Election Campaign Act provides, in pertinent part:

> The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

2 U.S.C. § 437h (1976).

134. 591 F.2d at 33. The plaintiffs' article III standing in *Bread Political Action Committee* was made more complicated because they were political associations. Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333 (1977), sets out the three requirements for associational standing:

> [W]e have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id. at 343. *Bread Political Action Committee* was not the usual case of associational standing since the group did not represent a series of individual, injured plaintiffs. Thus, the plaintiffs in *Bread Political Action Committee* faced potentially difficult problems regarding the demonstration of injury in fact.

135. 591 F.2d at 33. The court concluded that Congress intended that all constitutional questions be reviewed under section 437h. There are two review provisions under the Federal Election Campaign Act, sections 437h and 437g. Section 437g provides for enforcement actions brought by the Commission or any individual and provides that the case must be advanced on the calendar ahead of all other cases filed in the court except 437h actions. 2 U.S.C. § 437g (1976). The Seventh Circuit found it to be anomalous that non-constitutional questions might receive quicker review than constitutional questions and found no evidence that Congress perceived a need for faster review of constitutional questions brought by named section 437h plaintiffs than by any plaintiff with article III standing. 591 F.2d at 33.

136. 424 U.S. 1 (1976).

137. The Seventh Circuit stated:

enth Circuit in *Bread Political Action Committee* determined that Congress' purpose for naming the three types of plaintiffs in the statute was to insure their standing to raise constitutional challenges to the act, not limit the types of plaintiffs who may bring such challenges.[138]

Stenographic Machines v. Regional Administrator[139] involved the interesting question of who has standing to challenge the refusal of the administrator to certify a foreign worker for alien employment. The Immigration and Nationality Act[140] allows alien workers to obtain a visa which permits employment only after the administrator certifies that there are no American workers "willing, qualified, and available" at the time of the application. In *Stenographic Machines*, the employer hired an alien as a precision grinder and after twenty-eight months sought a certification. The Assistant Regional Director for Manpower, however, found that sufficient American precision grinders were available based on state employment agency data and rejected the certification application.

Both the prospective alien employer and alien employee sued in *Stenographic Machines*. The employer sought to show that the decision was based on a conclusionary, unsupported record, especially because

> There is no indication in the language of the statute of any intent to exclude any plaintiffs who have standing under traditional rules. In our view, Congress intended to expand the limits of standing under § 437h to the extent possible under Article III. This intent is wholly consistent with the expressed purposes of the statute.

591 F.2d at 33.

138. In so doing, the court stated:

> Congress' purpose for naming the three types of plaintiffs found in subsection (a) was to insure, within constitutional limits, their standing to raise constitutional challenges to the Act. Congress may well have entertained doubts about the standing of the specified plaintiffs to challenge many of the Act's provisions. And Congress apparently thought that it was important that those plaintiffs, in addition to others with obvious personal interest in the restrictions imposed by the Act, be allowed to test the constitutionality of the Act. Each of the specified plaintiffs has a generalized interest in the operation of the entire Act, which may not have provided standing under the prudential rules of the federal courts, but which Congress may have deemed sufficiently important, due to the central role of each specified plaintiff in the election process to justify a Congressional grant of standing.

Id. at 33-34 (citations omitted).

139. 577 F.2d 521 (7th Cir. 1978).

140. The Immigration and Nationality Act provides, in pertinent part:

> Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> . . . .
>
> Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

8 U.S.C. § 1182(a)(14) (1976).

the record did not show how the state employment agency acquired its data.[141] The alien employee argued that the state had shown only that one American worker was available and that the statute required a showing that worker*s* are available.[142] Finally, the Department of Labor argued that the prospective alien employee lacked standing because the purpose of the act is to protect American workers. Thus, the Department of Labor concluded that the prospective alien employee was not within the zone of interests sought to be protected by the statute.[143] The district court refused to set aside the Department of Labor's determination, but did so in a summary judgment order issued without opinion. Thus, the district court did not express an opinion of the Department of Labor's standing argument.[144]

In *Stenographic Machines*, the Seventh Circuit, while affirming the district court, rejected the Department of Labor's arguments regarding standing.[145] The court had held in an earlier case that employers had standing under the statute because their interest as potential employers was within the zone of interest.[146] The court in *Stenographic Machines* reasoned that it followed that prospective employees had a similar interest:

> Although the . . . [statute] . . . was designed to protect American workers, that provision is part of chapter 12 of the Immigration and Nationality Act, which, inter alia, states the standards for determining whether given classes of aliens are to be permitted to enter and remain in the United States, and was necessarily intended at least in part for the protection of aliens who are arguably entitled to enter or remain in the United States on the basis of those standards.[147]

After determining that the alien employee had standing to bring suit, the Seventh Circuit addressed the arguments presented by the alien employee and alien employer.[148] With regard to the alien employee's contention that the statute required a showing that worker*s* are available, the court reasoned that a single American worker is entitled to as much protection as a large number of workers would be under the statute.[149] Finally, the court in *Stenographic Machines* concluded that the alien employer failed to show that the procedures used to determine

141. 577 F.2d at 524.
142. *Id.* at 528-29.
143. *Id.* at 527-28. *See* Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970), regarding the zone of interests which are protected by the statute.
144. *See* 577 F.2d at 527.
145. *Id.* at 528.
146. Secretary of Labor v. Farino, 490 F.2d 885 (7th Cir. 1973).
147. 577 F.2d at 528.
148. *Id.* at 529.
149. *Id.*

the availability of American workers for the job were unreliable.[150]

Exhaustion of Administrative Remedies

Litigants often prefer to take their case to court before the agency process has run its course. The principal barrier to judicial review before a final agency order is the doctrine that administrative remedies must be exhausted before judicial review on the merits may be obtained.[151] However, the exhaustion doctrine is more a confused group of incomplete and contradictory principles than it is a coherent doctrine.[152] Those wishing to rush to court generally plead that one of the several exceptions to the exhaustion requirement is applicable.[153] All of these exceptions have as a common theme that there are no benefits to be gained from continued resort to the administrative process.[154] Courts, however, have become adept at probing this pleading fiction. Consequently, the results of such exhaustion of administrative remedies cases are usually sensible but they defy easy generalization.

The most frequently asserted exception to the doctrine is that exhaustion is not required if it is alleged that the agency's action is unconstitutional or *ultra vires*.[155] It is the province of the courts to decide questions of constitutional authority and construe statutes granting the agency jurisdiction.[156] Access to the courts is said to be "essential" to the decision of these questions,[157] although it has always been recognized that in many cases the administrative process is useful to frame constitutional or *ultra vires* issues.[158] For this reason, there are two troublesome problems in asserting the defense. First, when the United States Supreme Court pronounced the exhaustion rule in *Myers v. Bethlehem Shipbuilding Corp.*,[159] the Court suggested that failure to exhaust was jurisdictional.[160] But, subsequent decisions by the Court have articulated a policy rationale for the doctrine which suggests that exhaustion need not always be treated as jurisdictional. Rather, these later

150. *Id.* at 525-26.
151. Myers v. Bethlehem Shipbldg. Corp., 303 U.S. 41, 50-51 (1938).
152. 3 K. DAVIS, ADMINISTRATIVE LAW § 20.01 (1958 ed.) [hereinafter referred to as DAVIS].
153. *See, e.g.*, Allen v. Grand Central Aircraft Co., 347 U.S. 535 (1954).
154. McKart v. United States, 395 U.S. 185 (1969).
155. Allen v. Grand Central Aircraft Co., 347 U.S. 535 (1954).
156. Richardson v. Morris, 409 U.S. 464 (1973) (per curiam); California Comm'n v. United States, 355 U.S. 534, 539 (1938).
157. California Comm'n v. United States, 355 U.S. 534, 539 (1938).
158. *E.g.*, Marshall v. Northwest Orient Airlines, Inc., 574 F.2d 119 (2d Cir. 1978); *see* DAVIS, *supra* note 152, at § 20.04.
159. 303 U.S. 41 (1938).
160. *See id.* at 52.

United States Supreme Court cases suggest a balancing test which is discretionary with the court.[161] The Court has not clearly resolved the inconsistency between exhaustion as a jurisdictional and discretionary doctrine.[162]

In *Wright v. Califano*,[163] the Seventh Circuit was faced with applying this inconsistency. The issue in *Wright* was whether a class had a right to prompt determination of Old Age and Survivors Benefits eligibility.[164] The plaintiff in *Wright* had filed for survivors benefits and had the initial application and reconsideration denied.[165] Plaintiff then invoked the statutory right to a hearing[166] and when no hearing was scheduled, filed an action on behalf of himself and others similarly situated alleging a violation of due process.[167] The Social Security Administration alleged failure to exhaust administrative remedies. The Seventh Circuit, however, applied the balancing test and did not require the exhaustion of administrative remedies.[168] The *Wright* court, basing its decision on the United States Supreme Court decision in *Weinberger v. Salfi*,[169] held that only the filing of an application for benefits is jurisdictional; once the application is filed, exhaustion is "waivable" by the court.[170]

Wright was an easy case for relaxation of the exhaustion requirement and a good example of the situations in which exhaustion should not be required. The continued exercise of agency jurisdiction in a case such as *Wright* will add little, if anything, to clarifying the issue the court must resolve. In addition, a prompt decision by the court on the issue is important to the agency and the applicants who are being deprived of potential benefits. Other cases where the litigants attempt to

161. The reasons for exhaustion need not always be treated as jurisdictional. The reasons for exhaustion are said to require that the need for a full administrative record, the application of agency expertise, the efficiency gains from allowing the administrative process to run its course and the possibility that the need for judicial review will be avoided be balanced against the hardship to the individual of being deprived of judicial relief. Thus, this balancing test suggests that exhaustion is to some extent discretionary with the court. McKart v. United States, 395 U.S. 185 (1969).

162. *See* Weinberger v. Salfi, 422 U.S. 749 (1975). The Court has been interpreted as holding that the necessity to exhaust is only a jurisdictional prerequisite if the statute makes resort to the agency a mandatory requirement. Montgomery v. Rumsfeld, 572 F.2d 250 (9th Cir. 1978); *Standing Under Hunt*, *supra* note 131.

163. 587 F.2d 345 (7th Cir. 1978). For a discussion of other aspects of the *Wright* case, *see* notes 66-74 *supra* and accompanying text and Wright v. Califano, 603 F.2d 666 (7th Cir. 1979).

164. 42 U.S.C. § 402 (1976).

165. *See* 587 F.2d at 347.

166. 42 U.S.C. § 405(b) (1976).

167. *See* 587 F.2d at 347-48.

168. *Id.* at 348-49.

169. 422 U.S. 749 (1975). *See also* Califano v. Sanders, 430 U.S. 99 (1977).

170. 587 F.2d at 348.

frame the issue as one of constitutional right or *ultra vires* to avoid the exhaustion issue are more difficult for the courts. *Rosenthal & Co. v. Bagley*[171] was such a case.

In *Rosenthal*, the Seventh Circuit again illustrated that the principal issue in exhaustion is whether there is an advantage in leaving the issue with the agency rather than the adroitness of the pleadings. The plaintiff in *Rosenthal* was a registered commodities broker defending reparations claims[172] before the Commodities Futures Trading Commission. Plaintiff challenged the Commission's jurisdiction on the ground that reparations claims are suits at common law and thus the seventh amendment provides the right to a trial by jury.[173] While the Seventh Circuit noted that the seventh amendment might "arguably" prevent the Commodities Futures Trading Commission from regulating reparations claims,[174] the court determined that administrative review was proper where the private party is not deprived of any substantive rights by requiring the exhaustion of remedies.[175] The *Rosenthal* court concluded that the exhaustion requirement in such instances promotes administrative and judicial efficiency.[176]

A party seeking to avoid the exhaustion requirement will generally attempt to characterize the issue as a question of constitutional right or a question of law involving only statutory construction.[177] No general

171. 581 F.2d 1258 (7th Cir. 1978).

172. 7 U.S.C. § 18(e) (1976). The Commodities Future Trading Commission (CFTC) is empowered to receive and hear complaints from any member of the public who claims to be aggrieved by a trader registered or required to register under the act. If the CFTC finds a violation of the act after a hearing, the CFTC may order reparation payments of up to $5,000 to the injured party. *See* Hornblower & Weeks-Hemphill Noyes v. Csaky, 427 F. Supp. 814 (S.D.N.Y. 1977).

173. 581 F.2d at 1259. *See* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 449-61 (1977), for a discussion of Congress' power to create administrative agencies with the power to assess civil penalties.

174. 581 F.2d at 1261.

175. The Seventh Circuit stated:

> An exception has been recognized in our cases, whether the asserted right is based on the Constitution, statute, or regulation: When the agency would violate a clear right of the plaintiff if allowed to proceed, the court will intervene. We do not view this case as falling within the clear-right exception. To reach that conclusion we need go no further than Atlas Roofing Co. v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1977), which contains a comprehensive review and evaluation of the authorities dealing with the scope of the Seventh Amendment's limitation on Congress' power to commit dispute determination to administrative tribunals. That the Seventh Amendment prevents the relegation of reparations claims to the Commodity Futures Trading Commission is arguable but far from clear. At least when only "public rights" are involved, Congress may provide for administrative fact finding with which a jury trial would be incompatible. And the fact that new statutory "public rights" are enforcable in favor of a private party does not mean they cannot be committed to an administrative agency for determination. Moreover, "the right to a jury trial turns not solely on the nature of the issue to be resolved but also on the forum in which it is to be resolved."

Id. (citations omitted).

176. *Id.*

177. *See* text accompanying notes 155-58 *supra*.

principle to distinguish these two types of cases has ever been articulated by the courts, although the cases applying the distinction are consistent with the purposes exhaustion is said to serve as the Seventh Circuit's decision in *Uniroyal, Inc. v. Marshall*[178] illustrates. In *Uniroyal*, the plaintiff challenged the Department of Labor's right to require pre-hearing discovery by rulemaking in federal contract discrimination proceedings.[179] The Department of Labor does not have the express authority to order pre-hearing discovery through rulemaking. Rather, the Department of Labor's authority, if any, rests on Executive Order 11,246[180] which prohibits discrimination by government contractors.

In a well-reasoned opinion by Judge Prentice Marshall of the United States District Court for the Northern District of Illinois, sitting by designation, the court recognized that the mere presense of an issue of statutory construction does not avoid the necessity to exhaust. According to the Seventh Circuit, the issue is still the extent to which further administrative action would better frame the issues for subsequent judicial review.[181] The *Uniroyal* court briefly examined the complex issues of implied rulemaking authority and administrative discovery[182] and concluded that the Department of Labor had not exceeded its authority under Executive Order 11,246.[183] Thus, the court decided that it could better assess the issue after the agency presented its justifications for pre-hearing discovery.[184] *Uniroyal* is correctly decided because the issue is not simply one of drawing competing inferences from the words of a statute. Rather, the case involved the necessity for the

178. 579 F.2d 1060 (7th Cir. 1978).

179. The challenge to the Department of Labor's rule came after Uniroyal responded to the discovery requests with "dilatory" and "uncooperative" tactics. *Id.* at 1062.

180. Executive Order 11,246 provides, in pertinent part:

> It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all qualified persons, to prohibit discrimination in employment because of race, creed, color, or national origin, and to promote the full realization of equal employment opportunity through a positive, continuing program in each executive department and agency. The policy of equal opportunity applies to every aspect of Federal employment policy and practice. . . .
>
> . . . .
>
> The Secretary of Labor shall be responsible for the administration of Parts II and III of this Order and shall adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof.

Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965).

181. 579 F.2d at 1064-66. *See* DAVIS, *supra* note 152.

182. 579 F.2d at 1066-67. In recent years, federal courts have expressed a preference for rulemaking over adjudication and implemented this preference by liberally constructing general grants of rulemaking authority. National Petroleum Refiners Ass'n v. Federal Trade Comm'n, 482 F.2d 672 (D.C. Cir. 1973).

183. 579 F.2d at 1067.

184. *Id.* at 1065.

court to place an agency's claim of power within the context of the agency's statutory mission to determine if the agency's claim of authority was precluded by Congress. This is precisely the type of controversy where the administrative record should be complete prior to judicial review.

Another exception to the exhaustion requirement which is relied upon by plaintiffs is the plea that exhaustion is not required because the agency cannot grant effective relief. The requirement of exhaustion of administrative remedies has its roots in the doctrine that equity will not grant relief unless the remedy at law is inadequate.[185] The administrative law analogue is the doctrine that exhaustion is not required if the administrative remedy is inadequate.[186] The latter doctrine was applied by the Seventh Circuit in *Coutu v. Universities Research Association, Inc.*[187] *Coutu* was a suit for the retroactive application of the Davis-Bacon Act,[188] which requires that workers on federal projects be paid the prevailing wage rates in the area, to work performed on the Fermi National Accelerator Laboratory. The defendant argued that the court lacked jurisdiction because the plaintiffs had failed to exhaust their administrative remedies.[189] The Seventh Circuit in *Coutu* held that exhaustion of administrative remedies is not a jurisdictional prerequisite where the statute does not require exhaustion.[190] Further, the court speculated that the administrative remedies under the Davis-Bacon Act may be directed toward contractor compliance and not toward subsequent remedies for employees.[191]

Preclusion of Judicial Review

Under section 701(a)(2) of the Administrative Procedure Act,[192] there is no judicial review of "agency action committed to agency discretion by law" under the Administrative Procedure Act.[193] Commentators and courts have struggled for years to derive consistent standards from this cryptic and enigmatic phrase.[194] Some have argued that the Constitution guarantees a right to judicial review of all agency action

185. *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 428-29 (1965).
186. *Id.* at 426.
187. 595 F.2d 396 (7th Cir. 1979).
188. 40 U.S.C. § 276a(a) (1976).
189. 595 F.2d at 400.
190. *Id.*
191. *Id.* at 401.
192. 5 U.S.C. § 701(a)(2) (1976).
193. *Id.*
194. The cases and commentary are concisely discussed in W. GELLHORN, C. BYSE & P. STRAUSS, ADMINISTRATIVE LAW 938-53 (7th ed. 1979).

alleged to be arbitrary.[195] Others have argued that Congress may preclude judicial review of classes of actions, even if the action is arbitrary.[196] Finally, others have alleged that section 701(a)(2) is more a general charter than a precise statutory command and thus a court can develop a "common law" of judicial review based on a variety of factors.[197] In *Citizens to Preserve Overton Park v. Volpe*,[198] the United States Supreme Court indicated that section 701(a)(2) was to be construed narrowly and that a court was to refrain from exercising judicial review only if there was no law to apply.[199] *Overton Park* makes it clear that the existence of broad administrative discretion *per se* does not immunize an action from judicial review. Therefore, the issue is whether Congress bounded the discretion sufficiently to permit meaningful judicial review of some issues or whether the discretion is so broad that a court would be treading on the legislative prerogative were it to take judicial review. Basically, this construction of "committed to agency discretion by law" requires the courts to decide if Congress provided a sufficient ranking of the values the agency was given the discretion to consider so that at least some aspects of the agency's decision are reviewable. Under this standard, the conclusion that some aspects of the decision are not subject to judicial review does not preclude review of other aspects of the action. The Seventh Circuit adopted this construction of section 701(a)(2) in *Starr v. Federal Aviation Administration*.[200]

Starr involved the Federal Aviation Administration's[201] mandatory retirement age for pilots[202] which permits an exception to the rule where the FAA administrator finds that such action would be in the public interest.[203] The plaintiff, a pilot who had reached the retirement age, sought an exemption which was denied by the FAA.[204] On appeal, the FAA argued that this statute was unreviewable because

195. Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965 (1969).
196. DAVIS, *supra* note 152, at § 28.16.
197. Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion"*, 82 HARV. L. REV. 367 (1968).
198. 401 U.S. 402 (1971).
199. *See id.* at 410-14.
200. 589 F.2d 307 (7th Cir. 1978).
201. Hereinafter referred to as the FAA.
202. The FAA mandatory retirement provision was upheld in Airline Pilots Ass'n, Int'l v. Quesada, 276 F.2d 892 (2d Cir. 1960), *cert. denied*, 366 U.S. 962 (1961).
203. 49 U.S.C. § 1421(c) (1976).
204. The FAA refused to hear evidence on the issue of his physiological versus chronological age on the ground that the agency would grant no exemptions until it was convinced that there was medical evidence to establish new standards which would be applicable to all pilots. 589 F.2d at 308-09.

the action was committed by law to agency discretion. The Seventh Circuit in *Starr* adopted the modern construction of section 701(a)(2)[205] and held that the discrection was limited because the FAA administrator was "bound by the statutory framework of the program administered by the agency."[206] Thus, judicial review was possible because standards could be derived from the statutory context. *Starr* is a good example of when a court should refuse to defer to the agency's discretion because the agency's mandate is relatively narrow. Thus, the court can enforce a congressional mandate through judicial review without depriving the agency of the freedom to formulate policy.[207]

STANDARDS OF JUDICIAL REVIEW AND JUDICIAL REMEDIES

Standards of Judicial Review

The United States Courts of Appeals are frequently asked to apply various standards of judicial review to administrative decisions. By and large, judicial review of agency action is an ineffective means of controlling agency discretion unless the court decides to classify the issue as a question of law or can isolate a discrete procedural error. The Seventh Circuit in 1978-79 considered several cases where it was alleged that the decision was not supported by substantial evidence on the record as a whole. These cases seldom provide useful precedents because the court gives little indication of the weight it attaches to the relevant factors.[208] Occasionally, however, the court catches an agency

205. The *Starr* court first held that the action was reviewable under the arbitrary and capricious standard rather than the substantial evidence standard. *Id.* at 310-11. Having put the "cart before the horse," the Seventh Circuit then adopted the modern review of section 701(a)(2). *Id.* at 311.

206. *Id.*

207. On the merits, however, the court held that the mandatory retirement rule was reasonable and thus it was not an abuse of discretion to reject individual applications "even if the applicant demonstrates that he personally is a superman immune from the impairments that age normally inflicts." *Id.* at 312-13.

208. *See, e.g.*, Lieberman v. Califano, 592 F.2d 986 (7th Cir. 1979). The question in *Lieberman* was whether these hearings established the right of a sixty-nine year old immigrant to child's benefits. The issue was whether plaintiff's disability reached disabling severity before age eighteen. At the first hearing, the administrative law judge concluded that the medical evidence failed to trace the disability back more than forty years, despite family testimony that Mrs. Lieberman had a life-long problem with extreme nervousness. At the second hearing, a psychiatrist's report favorable to Mrs. Lieberman was contradicted by a neurologist's report which refused to trace her condition prior to the age of twenty-two. In short, there was a four-year gap which could not be bridged in the second hearing. The case raises interesting questions about the permissible inferences which can be drawn from medical evidence in cases where the examinations must occur long after the alleged disability began, but neither the majority or dissenting opinions give much clue as to how cases raising similar gaps in evidence would be decided in the Seventh Circuit. *See also* Williams v. Califano, 593 F.2d 282 (7th Cir. 1979) (substantial evidence on record as a whole applies to default judgments against the Secretary of HEW).

in a clear violation of the substantial evidence standard. For example, administrative law judges sometimes knit together a decision by considering only evidence favorable to the decision and failing to consider evidence which detracts from the agency's decision.[209] The court frequently reviews, *de novo*, agency constructions of their substantive mandate; but most decisions involve the application of clear United States Supreme Court or other federal circuit court precedents.[210] For example, in *Marshall v. L.E. Myers Co.*,[211] the Seventh Circuit affirmed an equally divided Occupational Safety and Health Review Commission opinion. The court followed the statutory construction of the District of Columbia Circuit,[212] refusing to find an OSHA violation[213] when an employee, who died in an accident, was negligent and when there was no evidence that the equipment used by the employee was a recognized hazard.[214]

209. *See, e.g.*, Peabody Coal Co. v. Director of Wkrs. Compensation Programs, 581 F.2d 121 (7th Cir. 1978).

210. *See, e.g.*, Rogers Cartage Co. v. Interstate Commerce Comm'n, 595 F.2d 379 (7th Cir. 1979). The court held that the ICC correctly applied the circuit's rule announced in Hilt Truck Line, Inc. v. United States, 548 F.2d 214 (7th Cir. 1977) (per curiam), to determine if a trucker's certificate of public convenience and necessity was dormant and that there was substantial evidence to support the administrative law judge's finding that applicant should be switched from a contract to common carrier license. Karp v. North Central Airlines, Inc., 583 F.2d 364 (7th Cir. 1978), applied Nader v. Allegheny Airlines, 512 F.2d 527 (D.C. Cir. 1975), *rev'd on other grounds*, 426 U.S. 290 (1976), which held that any airline which fails to follow its own priority rules to allocate space on an overbooked flight violates the Federal Aviation Act, 49 U.S.C. § 1374 (1976). *See also* Bratton v. Shiffrin, 585 F.2d 223 (7th Cir. 1978), *vacated and remanded*, 99 S. Ct. 3094 (1979), implying a private cause of action under the Federal Aviation Act, 49 U.S.C. § 1301 (1976), against a bank which violated Civil Aeronautics Board regulations governing charter flights.

Kephart v. Institute of Gas Technology, 581 F.2d 1287 (7th Cir. 1978), involved the question of whether the failure of an alleged victim of age discrimination to file the requisite 180 day notice of intention to sue his employer is a jurisdictional requirement or may be tolled on equitable grounds. The Seventh Circuit has joined a growing number of circuits which hold that the notice period is not jurisdictional. In *Kephart*, the 180 day period was tolled because the employer failed to conspicuously post notice of the employee's rights under the Age Discrimination Employment Act, 29 U.S.C. § 626(d) (1976). *See also* Central Wisconsin Bankshares, Inc. v. Board of Governors, 583 F.2d 294 (7th Cir. 1978) (mandatory ninety-one day approval period in Federal Reserve Board approval of a bank acquisition is "retriggered" by Federal Reserve Board's request for new information necessary for a full consideration of the case); Bomba v. W.L. Belvidere, Inc., 579 F.2d 1067 (7th Cir. 1978) (doctrine of equitable estoppel applies to three-year statute of limitations under the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701 (1976)).

211. 589 F.2d 270 (7th Cir. 1978).

212. The *Myers* opinion followed the leading case of National Realty & Constr. Co. v. Occupational Safety & Health Review Comm'n, 489 F.2d 1257 (D.C. Cir. 1973), which held that OSHA does not impose a strict liability standard on employers. *Id.* at 1265-66; *accord*, Horne Plumbing & Heating Co. v. Occupational Safety & Health Review Comm'n, 528 F.2d 564, 568 (5th Cir. 1976).

213. 29 U.S.C. § 654(a)(1) (1976).

214. 589 F.2d at 272-73. *Myers* is consistent with other federal circuit court decisions. *E.g.*, Champlin Petroleum Co. v. Occupational Safety & Health Review Comm'n, 593 F.2d 637 (5th Cir. 1979); Danco Constr. Co. v. Occupational Safety & Health Review Comm'n, 586 F.2d 1243

Review of Agency Choice of Policy-Making Procedures

One of the strongest arguments for administrative agency involvement is that the agency can respond quickly to changed conditions. The agency's flexibility to adopt and implement new policies, however, must be balanced against elementary notions of fairness to the regulated. Two areas where the competing interests of flexibility and fairness must be balanced are the retroactive application of agency policies and the duty of an agency to follow its own decisions. If an agency adopts a rule in its quasi-legislative capacity, it can only change the rule through a rulemaking procedure and, hence, the change is prospective only.[215] However, the agency's power to change positions retroactively through adjudication is substantial.[216] On occasion, the United States Supreme Court has suggested that some adjudicative actions which result in a retroactive change may deny a person due process,[217] but it has never so held. The Seventh Circuit applied this suggestion by the United States Supreme Court in *Natural Gas Pipeline Co. of America v. Federal Energy Regulatory Commission*.[218]

During 1970, to alleviate a natural gas shortage, pipeline companies were encouraged to make lease acquisition and exploration costs payments to natural gas companies to stimulate production. The Federal Energy Regulatory Commission[219] indicated that under certain conditions these advance payments could be included in the rate base. The plaintiff in *Natural Gas Pipeline Co.* sought to include approximately $4.7 million of such payments in its rate base.[220] The payments were made and nine months later the plaintiff filed for a rate increase.[221] The FERC then issued an administrative order, after an adjudicatory hearing, which limited the plaintiff to payments made thirty days before the filing of the increase.[222]

(8th Cir. 1978). *See also* Brennan v. Occupational Safety & Health Review Comm'n, 501 F.2d 1196 (7th Cir. 1974), for a prior Seventh Circuit decision on OSHA regulations.

215. *See, e.g.*, SEC v. Chenery Corp., 332 U.S. 194 (1947).

216. *See, e.g.*, NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974); NLRB v. Wyman-Gordon, 394 U.S. 759 (1969); SEC v. Chenery Corp., 332 U.S. 194 (1947).

217. *See* NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

218. 590 F.2d 664 (7th Cir. 1979).

219. Hereinafter referred to as the FERC.

220. 590 F.2d at 665.

221. *Id.*

222. The FERC had developed its advance payment program through a series of tentative and inconsistent orders from 1970 to 1973. The crucial order was No. 499, issued on December 28, 1973, which provided:

> We shall not consider amounts advanced to be 'reasonable and appropriate' for inclusion in rate base where such amounts are in excess of costs for exploration, development and production incurred by the producer within a reasonable time from the date such amounts advanced are included in the pipeline's rate base.

In *Natural Gas Pipeline Co.*, the Seventh Circuit held that the FERC could not modify its administrative order retroactively by adding a thirty day limitation.[223] The court relied on language in *NLRB v. Bell Aerospace Co.*[224] which suggests that an agency cannot make a retroactive change through adjudication when there has been good faith reliance on the prior order.[225] In so doing, the Seventh Circuit concluded that:

> The consequences to the appellant . . . are very severe. It would mean the imposition of a large liability with regard to the advances in the present case. Furthermore, the appellant's entering into these agreements, under these terms, was in reliance upon the prior orders of the Commission, and the policies reflected in those orders, specifically the policies encouraging the advance payment program, with few restrictions, and the promulgation of a flexible standard with regard to the advance-expenditure time relationship.[226]

Natural Gas Pipeline Co. is a perfect case to apply the good faith reliance standard because the agency induced the commitment of substantial financial resources without giving pipeline companies any clear guidelines as to the rate base treatment of the advance payment expenditures. The case can be limited to its facts since the agency offered no reason why developing its rate base treatment policy could not be done just as effectively through rulemaking. Even narrowly read, however, the case is a significant application of the United States Supreme Court's willingness to review the choice between adjudication and rulemaking and may serve as an important precedent to force agencies to use rulemaking to announce important policies prospectively or provide sufficiently clear guidelines for future conduct in orders issued after an adjudication.

A related problem arises when it is alleged that an agency departs from its own precedents. To give agencies the necessary flexibility to adapt their policies rapidly to changed conditions, administrative agencies are not bound by *stare decisis*. However, that flexibility is often a polite name for arbitrariness, and the United States Supreme Court modified the *stare decisis* rule to require the agency to explain departures from a prior decision.[227] This judicial enforcement of a consistency requirement is often frustrated by the difficulty in deciding what an agency decision stands for and thus it is often easy for an agency to

590 F.2d at 667.

223. *Id.* at 669.
224. 416 U.S. 267 (1974).
225. *Id.* at 295.
226. 590 F.2d at 669.
227. Secretary of Agriculture v. United States, 347 U.S. 645 (1954).

explain a seeming inconsistency. In *Pre-Fab Transit Co. v. United States*,[228] the Interstate Commerce Commission[229] refused to permit the plaintiff truck company to haul certain building components on the ground that such components had to be hauled by "heavy haulers" which plaintiff was not.[230] The administrative law judge upheld the ICC decision.[231] On appeal, the Seventh Circuit properly characterized the ICC decisions on the issue as confusing and unpredictable.[232] Nevertheless, the court upheld the administrative law judge's conclusion that the ICC had satisfactorily explained its departure from past decisions.[233] The consistency requirement is generally followed in the Seventh Circuit[234] and the *Pre-Fab* decision does not seriously erode this position.

Availability of Mandamus

A plaintiff who has a claim against an agency often wants specific relief against the agency officer who wrongfully refused to take action. Such a plaintiff will often seek a writ of mandamus.[235] Mandamus in such instances, however, lies only to compel a ministerial duty owed by the agency and that ministerial duty exists only if the statute defining the duty is clear.[236] Commentators have long argued that this standard is too rigid because it precludes a court from a further analysis of the background of the statute to determine the degree of discretion delegated the agency.[237] The issue is the scope of delegated discretion and the need to protect individuals from arbitrary action requires the court to examine all the circumstances surrounding the decision to determine if the agency is acting within the scope of its delegated authority or has exceeded it. The Seventh Circuit appears to have adopted this less rigid mandamus standard in *Jarecki v. United States*.[238]

228. 595 F.2d 384 (7th Cir. 1979).
229. Hereinafter referred to as the ICC.
230. *See* 49 U.S.C. § 301 (1976).
231. *See* 595 F.2d at 386.
232. *Id.* at 387.
233. *Id.* at 389.
234. Hilt Truck Line, Inc. v. United States, 548 F.2d 214 (7th Cir. 1977).
235. Mandamus seeks to compel an officer of the United States "to perform a duty owed to the plaintiff." 28 U.S.C. § 1361 (1976).
236. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 181 (1965). *See, e.g.*, Wilbur v. United States, 281 U.S. 206 (1930); Haneke v. Secretary of HEW, 535 F.2d 1291 (D.C. Cir. 1976). *But cf.* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 23.09 (1978 Supp.).
237. *See* DAVIS, *supra* note 152, at § 23.11; Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1967).
238. 590 F.2d 670 (7th Cir. 1979), *cert. denied*, 48 U.S.L.W. 3218 (U.S. Oct. 2, 1979) (No. 78-1648).

In *Jarecki*, the plaintiffs sought to mandamus the General Services Administration[239] to reclassify them from civilian guards to Federal Protective Officers. The plaintiffs alleged that the Protection of Property Act[240] required the GSA to select the special police force from the ranks of uniformed guards only and not other federal officers. To decide whether mandamus should issue, the court carefully examined the legislative history of the Protection of Property Act.[241] In so doing, the court concluded that even if the legislative history indicated that Congress intended the GSA to draw only upon uniformed guards, the limitation did not create a duty towards the plaintiffs because the reason for the limitation was to insure the public that the GSA obtained capable personnel.[242] *Jarecki* is an important decision by the Seventh Circuit since it opens up the possibility of mandamus in the face of statutory language which gives an agency the discretion to choose among several possible outcomes. The *Jarecki* decision requires that the court make its own determination of what discretion was delegated and decide if the action being reviewed falls within the scope of the delegated discretion.

CONCLUSION

This survey of 1978-79 administrative law decisions by the Seventh Circuit defies a unifying conclusion. These recent administrative law cases, however, do reflect a realistic appreciation by the Seventh Circuit of the limits of judicial intervention into agency procedures. The result is a careful articulation by the court of the relevant factors which compose the often hazy principles of administrative law and a series of opinions more useful to practitioners than recent administrative law cases decided by the United States Supreme Court.

239. Hereinafter referred to as the GSA.
240. 40 U.S.C. § 318 (1976).
241. 590 F.2d at 673.
242. The Seventh Circuit stated that "the GSA did not depart from its delegated authority when it chose to by-pass the limitation to guards in favor of discharging its principal statutory duty to appoint carefully trained federal officers for the protection of federal buildings." *Id.*